87 727

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL TELEPHONE COMPANY OF CALIFORNIA, LOUISE W. BOWSER, and RICHARD SAYRE,
Petitioners,

vs.

FLOYD RAY ADDY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUGGESTION OF SUMMARY REVERSAL

PETITION FOR WRIT OF CERTIORARI

MARK F. SULLIVAN
General Telephone Company of California
1 GTE Place
Thousand Oaks, CA 91362
(805) 372-6103

PAUL GROSSMAN*
J. AL LATHAM, JR.
PAUL, HASTINGS, JANOFSKY & WALKER
22nd Floor
555 South Flower Street
Los Angeles, CA 90071
(213) 489-4000

Counsel for Petitioners

*Counsel of Record

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

1. Does the rule of *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Chardon v. Fernandez*, 454 U.S. 6 (1981), render an employment discrimination case time-barred, or is the limitations period tolled, when an employee who has been given notice of his termination is looking for another job?

2. Should equitable tolling principles protect an employee who is represented by counsel and is actively pursuing formal legal remedies?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the petitioners, General Telephone Company of California, Louise W. Bowser and Richard Sayre, as defendants and appellees, and respondent Floyd Ray Addy as plaintiff and appellant.[1]

---

[1] Evelyn McConnell was a plaintiff and appellant below. Petitioners do not seek review of the decision of the Court of Appeals for the Ninth Circuit with regard to Ms. McConnell, and do not believe that Ms. McConnell's interests or positions may be affected by this review. Ms. McConnell therefore is not named as a party to this proceeding. The Clerk is hereby notified of this omission pursuant to Supreme Court Rule 19.6.

Pursuant to Supreme Court Rule 28.1, petitioners state that the following list contains the names of all corporations in which outside persons or investors might have an interest that are related as parent, subsidiary or affiliate to corporate petitioner General Telephone Company of California: GTE Service Corporation; GTE Products of Connecticut Corporation; GTE Government Systems Corporation; GTE

Products Corporation; GTE Laboratories Incorporated; GTE International Incorporated; GTE Telecomuniccazioni S.P.A; GTE Sylvania Licht, GanbH; GTE ATEA N.V. - S.A.; GTE Communications Services Incorporated; GTE Sprint Communications Corporation; GTE Satellite Corporation; GTE Spacenet Corporation; GTE Telenet Incorporated; GTE Telenet Holding Company; GTE Support Services Incorporated; GTE TeleMessager Incorporated; GTE Valeron Corporation; Anglo-Canadian Telephone Company; British Columbia Telephone Company; Microtel Limited; Canadian Telephones and Supplies Ltd.; Dominion Directory Company Limited; Compania Dominicana de Telefonos, C. por A.; Quebec - Telephone; General Telephone Company of Alaska; GTEL; General Telephone Company of Florida; General Telephone Company of Illinois; General Telephone Company of Indiana, Inc.; General Telephone Company of Kentucky; General Telephone Company of Michigan; General Telephone Company of the Midwest; General Telephone Company of the Northwest, Inc.; West Coast Telephone Company of California; General Telephone Company of Ohio; General Telephone Company of Pennsylvania; General Telephone Company of the Southeast; General Telephone Company of the Southwest; General Telephone Company of Wisconsin; Hawaiian Telephone Company; The Micronesian Telecommunications Corporation; GTE Airfone Incorporated; Airfone International Incorporated; Railfone, Inc.; GTE Directories Corporation; GTE Data Services Incorporated; GTE Finance Corporation; GTE Finance N.V.; GTE Export Factoring Company B.V.; GTE Global Corporation; GTE Mobilnet Incorporated; GTE Realty Corporation; GTE Reinsurance Company Limited; GTE Shareholder Services Incorporated; GTE Telecom Incorporated.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR ISSUING THE WRIT AND GRANTING SUMMARY REVERSAL 7

I. The Decision of the Ninth Circuit Involves an Issue with Substantial Impact on Employers, and that Court's Radical Departure from the Holdings in Other Circuits Will Significantly Limit the Availability of Summary Judgment to Resolve Otherwise Time-Barred Discrimination Actions 7

II. The Ninth Circuit's Holding Squarely Conflicts with Holdings in Other Circuits By Disregarding the Essential Concepts Established in *Ricks* and *Chardon* 9

Page

A. In *Ricks* and *Chardon* the Supreme Court Adopted a Bright-Line Rule to Protect Employers from the Burden of Defending Stale Discrimination Claims 9

B. The Decision Below That Addy's Final Termination Notice Did Not Begin the Limitations Period is Contrary to *Ricks* and *Chardon* and Conflicts with Decisions in Other Circuits 10

C. The Ninth Circuit's Decision Disregards Other Circuits' Clear Holdings that Equitable Estoppel Is Not Available When A Claimant Has Counsel Or Is Otherwise Aware Of His Rights 18

D. The Ninth Circuit's Decision Is Irreconcilable With This Court's Recent Teachings on the Utility of Summary Judgment 21

CONCLUSION 23

Page

APPENDIX A

Opinion, Ninth Circuit Court of Appeals, Dated: April 10, 1987 ..... A-1

APPENDIX B

Minute Order, U.S. District Court for the Central District of California, Entered: September 30, 1985 and Reporter's Transcript of Proceedings on September 23, 1985 ..... B-1

APPENDIX C

Order, Ninth Circuit Court of Appeals, Dated: July 31, 1987 ..... C-1

APPENDIX D

29 U.S.C. §§ 621-634 (1982)
29 U.S.C. §§ 251-262 (1982)
F.R.C.P. Rule 56 ..... D-1

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Liberty Lobby, Inc.
477 U.S. 242, 106 S.Ct. 2505 (1986) 8

Aronsen v. Crown Zellerbach
662 F.2d 584 (9th Cir. 1981),
cert. denied, 459 U.S. 1200 (1983) 10, 18, 23

Boyd v. United States Postal Service
752 F.2d 410 (9th Cir. 1985) 11

Celotex Corp. v. Catrett
477 U.S. 317, 106 S.Ct. 2548 (1986) 8, 22

Cerbone v. ILGWU
768 F.2d 45 (2d Cir. 1985) 17, 20

Chardon v. Fernandez
454 U.S. 6 (1981) 8-11, 14, 18

Delaware State College v. Ricks
449 U.S. 250 (1980) 7-11, 14, 18, 21

Dillman v. Combustion Engineering, Inc.
784 F.2d 57 (2d Cir. 1986) 16

Edwards v. Kaiser Aluminum &
Chemical Sales, Inc.
515 F.2d 1195 (5th Cir. 1975) 20

Page

Kazanzas v. Walt Disney World Co.
704 F.2d 1527 (11th Cir.), *cert. denied*,
464 U.S. 982 (1983) 15

Kocian v. Getty Refining & Marketing Co.
707 F.2d 748 (3d Cir.), *cert. denied*,
464 U.S. 852 (1983) 19

Kriegesmann v. Barry-Wehmiller Co.
739 F.2d 357 (8th Cir.), *cert. denied*,
469 U.S. 1036 (1984) 17, 20

Leite v. Kennecott Copper Corp.
558 F.Supp. 1170 (D. Mass. 1983),
aff'd, 720 F.2d 658 (1st Cir. 1983) 19

Matsushita Electric Industrial, Co., Ltd. v. Zenith Radio Corp.
475 U.S. 574, 106 S.Ct. 1348 (1986) 8, 22

Miller v. Internat'l Tel. & Tel. Corp.
755 F.2d 20 (2d Cir.), *cert. denied*,
474 U.S. 851 (1985) 10, 12, 19-20

Morse v. Daily Press, Inc.
826 F.2d 1351 (4th Cir. 1987) 20

Mull v. Arco Durethene Plastics, Inc.
784 F.2d 284 (7th Cir. 1986) 14, 15

Naton v. Bank of California
649 F.2d 691 (9th Cir. 1981) 18

Page

O'Malley v. GTE Service Corp.
758 F.2d 818 (2d Cir. 1985) 19

Price v. Litton Business Systems, Inc.
694 F.2d 963 (4th Cir. 1982) 12, 14, 15, 17

Sanchez v. Loffland Brothers Co.
626 F.2d 1228 (5th Cir. 1980),
cert. denied, 452 U.S. 962 (1981) 15

Federal Statutes

28 U.S.C. § 1254(1) (1982) 2
28 U.S.C. § 1331 (1982) 2
29 U.S.C. §§ 251-262 (1982) 3
29 U.S.C. §§ 621-634 (1982) 3
42 U.S.C. § 1983 (1982) 10
42 U.S.C. §§ 2000e-2000e-17 (1982) 9

Rules

Federal Rules of Civil Procedure, Rule 6(a) 6
Federal Rules of Civil Procedure, Rule 56 ..... 3, 6

No. _____

IN THE

Supreme Court of the United States

October Term, 1987

GENERAL TELEPHONE COMPANY OF CALIFORNIA, LOUISE W. BOWSER, and RICHARD SAYRE,

Petitioners,

vs.

FLOYD RAY ADDY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUGGESTION OF SUMMARY REVERSAL

The petitioners, General Telephone Company of California, Louise W. Bowser and Richard Sayre, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 10, 1987. The petitioners further respectfully suggest that, upon the issuance of a writ of certiorari, this Court summarily reverse the Ninth Circuit's decision, which is flatly inconsistent with on-point decisions of this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 814 F.2d 1311, and is reprinted in the Appendix hereto ("App.") at A. The Ninth Circuit's order denying rehearing *en banc* is reprinted at App. C.

The minute order of the United States District Court for the Central District of California (Waters, J.) is unreported. It is reprinted at App. B, along with the transcript of the hearing at which summary judgment was granted.

JURISDICTION

Respondent sued in the United States District Court for the Central District of California on April 16, 1984, alleging federal jurisdiction under 28 U.S.C. § 1331 (1982). The district court, Waters, J., granted summary judgment to petitioners in a minute order entered September 30, 1985. App. B.

Respondent filed an appeal from the district court's grant of summary judgment on October 2, 1985. The Court of Appeals for the Ninth Circuit vacated the judgment and remanded the matter to the district court for further consideration in an opinion entered April 10, 1987. Petitioners' timely petitioned for rehearing and suggested rehearing en banc. The petition and suggestion were denied on July 31, 1987.

The jurisdiction of this Court to review the decision of the Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1987) (pertinent text set forth at App. D).

The Portal-to-Portal Act, 29 U.S.C.A. § 255 (West 1985 & Supp. 1987) (pertinent text set forth at App. D), incorporated by reference in 29 U.S.C. § 625.

Federal Rules of Civil Procedure, Rule 56, Summary Judgment (pertinent text set forth at App. D).

STATEMENT OF THE CASE

This case arises from a decision by the Court of Appeals for the Ninth Circuit vacating and remanding the district court's grant of summary judgment in favor of the employer in a case brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"). The dispositive issue involves the proper application of the statute of limitations in an ADEA action, 29 U.S.C. § 626(e)(1) (1982).[2]

Respondent Floyd Ray Addy ("Addy") began employment with General Telephone Company of California ("General Telephone") in 1972.[3] On May 7, 1980, he received an unfavorable review of his performance in his

---

[2] Section 626(e)(1) incorporates by reference the statute of limitations under the Portal-to-Portal Pay Act, which is two years for a standard violation and three years for a willful violation. *See* 29 U.S.C. § 255(a) (1982).

[3] Because this case was decided below on a summary judgment standard, facts set forth herein are the undisputed material facts that were presented to the district court.

design artist position.[4] On December 17, 1980, Addy received a written disciplinary warning that stated in pertinent part:

> In an effort to give you every opportunity to bring your performance up to the expected level, we will review your performance in 90 days. If adequate improvement is not made . . . you will be reclassified to an available position more commensurate with your skill level. If no vacancy exists, you may be released.

Volume 1, Tab CR 35, Exhibit D, pp. 153-54. During the subsequent 90 days Addy continued to make serious errors in his work. App. A at 7; Supp. Ex., Tab AB, pp. 158-63; Tab AC, pp. 166-71; Tab AD, pp. 174-96. On February 23, 1981, Addy's supervisors offered him a different job and told Addy that accepting this job was his "last chance."[5] When Addy did not respond to this "last chance" job offer by March 10, 1981, Supp. Ex. Tab AE, pp. 189-93, he understood that he was "getting his ass kicked out the door." Vol. I, Ex. B, p. 139. On March 16, 1981, Addy filed an administrative charge of age discrimination with the California Department of Fair Employment and Housing ("DFEH"), in which he alleged, *inter alia*, that he had been strongly urged "to take a lesser position" under the threat of having no job at all. Vol. 1, Tab CR 25, p. 24. At the time of this charge filing, Addy had his present counsel who was

---

[4] As a result of this unsatisfactory performance appraisal, Addy filed a formal internal grievance claiming that his supervisors were trying to force him to retire because of his age.

[5] Addy testified at deposition that he understood this "last chance" remark to mean, "This is it. Take it or leave it." Supp. Ex., Tab AE, pp. 189-93.

in frequent communication with the DFEH and EEOC. Vol. I, Tab CR 35, p. 251, lines 7-9, 20-22.

On March 20, 1981, General Telephone gave Addy formal written notice of termination.[6] The notice stated that Addy had failed to improve since the December 17, 1980, disciplinary warning and had failed to respond to the job offer given him on February 23, 1981. The March 20th notice concluded:

> You still do not meet the accepted standard of performance for a Design Artist II and you have refused an opportunity for employment in another classification. Therefore, *you are given until April 20, 1981 to find a position within the company for which you may be qualified. If you fail to find placement by that time, you will be released from employment with General Telephone Company.*

Vol. 1, CR 35, Exhibit E, pp. 155-56 (emphasis added).

At no point after this March 20, 1981, termination notice did General Telephone give Addy any assurances of alternative employment. App. A at 16; Vol. 2A, Tab 38, p. 848; Supp. Ex. Tab AG, p. 199. During March and April of 1981, Addy made entries on his desk calendar about applicants interviewing for his job. On April 15, 1981, he recorded that he was told by his supervisor that "if you don't get your stuff packed, I'll throw it in boxes for you." Vol. I, Tab CR 35, Ex. F, p. 157; Supp. Ex. Tab AH. Addy's last day of work was April 17, 1981, and he removed his last belongings from work on April 20, 1981. Supp. Ex. Tab AI, pp. 206-13.

---

[6] It is this date on which the district court held that the ADEA statute of limitations began to run.

Addy obtained a "right-to-sue letter" from the Equal Employment Opportunity Commission ("EEOC") on June 13, 1983. However, he did not file his original ADEA complaint in the United States District Court until April 16, 1984 — more than 3 years after his receipt of the March 20, 1981, termination notice, and three years to the day from the unmistakably direct order to pack up his office possessions and leave.[7]

Based upon the unrebutted facts set out above, the district court granted petitioners' motion for summary judgment under Fed. R. Civ. P., Rule 56. In announcing its decision, the court found that Addy "was told clearly and indisputably that he was going to be terminated . . . at least as early as March 20, [1981]." App. B at 9. Because respondent's federal court action was not filed within three years after that date, the district court concluded that the action should be dismissed, because the sole federal question, Addy's ADEA claim, was barred by the ADEA statute of limitations.[8]

On April 10, 1987, the Court of Appeals for the Ninth Circuit vacated the district court's judgment and remanded the case for further consideration. In concluding that summary judgment was inappropriate, the Court of Appeals thought that there were material factual issues regarding: (a) whether the March 20, 1981, letter constituted notice of facts that would support a charge of discrimination to a reasonably prudent, similarly situated individual; (b) the date when Addy received notice of General Telephone's decision not to offer him alternative

---

[7] April 15, 1984, was a Sunday. *See* Fed. R. Civ. P. 6(a).

[8] In his complaint Addy also asserted a number of pendent claims under state law, which are not relevant here.

employment; and (c) whether respondent reasonably relied upon alleged representations of possible alternative employment within General Telephone so as to equitably estop petitioner from asserting the bar of the statute of limitations. App. A at 16-17.

REASONS FOR ISSUING THE WRIT AND GRANTING SUMMARY REVERSAL

I. The Decision of the Ninth Circuit Involves an Issue with Substantial Impact on Employers, and that Court's Radical Departure from the Holdings in Other Circuits Will Significantly Limit the Availability of Summary Judgment to Resolve Otherwise Time-Barred Discrimination Actions.

Tens of thousands of individuals each year are faced with unemployment resulting from discharge, layoffs, and plant closings. Many employers provide dislocated workers with varying periods of time prior to discharge in which to seek alternative employment opportunities within the employer's workforce. Pursuant to the decision below, however, employers within the jurisdiction of the Ninth Circuit provide such grace periods at their own peril, even if the employer engages in no deceptive or misleading practices.

In *Delaware State College v. Ricks*, 449 U.S. 250, 259-260 (1980), this Court held that the statute of limitations runs *upon notice*, not upon the so-called effective date, of termination. In so holding, the *Ricks* Court acknowledged the important policy issues at stake, and specifically expressed its concern that beginning the limitations period on the " 'final day of employment' might discourage"

employers "from offering a 'grace period' " before termination during which a terminated employee could seek a "position elsewhere." *Id.* at 260 n.12. Petitioners submit that the Ninth Circuit resolved the instant case precisely contrary to *Ricks* by espousing two concepts that are at odds with the law in all other circuits. First, the decision below applied estoppel principles to defeat operation of the rule in *Ricks, supra,* and its later companion, *Chardon v. Fernandez,* 454 U.S. 6 (1981) (per curiam), even though there was no evidence of any "deliberate design" to mislead Addy or to lull him into not asserting his rights. Secondly, the Ninth Circuit appears to be alone in applying estoppel or tolling rules to save the discrimination claim of an employee who had counsel at all relevant times and was actively pursuing his remedies.

In addition to lowering the threshold prerequisites for equitable modification of limitations, the Ninth Circuit's decision also displays an apparent hostility to summary judgments that is irreconcilable with this Court's recent holdings in *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505 (1986); and *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348 (1986). On March 20, 1981, as the district court concluded, any reasonable man in Addy's position would have known that his job was gone. Indeed, Addy had admitted knowing this even in February with graphic reference to "getting his ass kicked out the door," Vol. 1, Ex. B, p. 139. Nevertheless, the Ninth Circuit found an issue of fact based on Addy's unsupported assertions that he expected that someone, somehow, would still find him a job.

II. The Ninth Circuit's Holding Squarely Conflicts with Holdings in Other Circuits By Disregarding the Essential Concepts Established in *Ricks* and *Chardon*.

A. In *Ricks* and *Chardon* the Supreme Court Adopted a Bright-Line Rule to Protect Employers from the Burden of Defending Stale Discrimination Claims.

In *Delaware State College v. Ricks, supra,* this Court established a bright-line rule that causes of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982) ("Title VII"), accrue at the time that an allegedly discriminatory decision is made and communicated to the aggrieved party. In *Ricks,* this Court concluded that, when a college professor was denied tenure, but was given a one-year " 'terminal' contract," the charge-filing limitations period commenced at the time the tenure decision was made and communicated. *Id.* at 258. The *Ricks* decision makes it clear that its rule applied even though one of the most significant *effects* of the denial of tenure — the termination of employment — did not occur until long after the notice. *Id.* The Court held:

> Congress has decided that time limitations periods commence with the date of the "alleged unlawful employment practice." *See* 42 U.S.C. § 2000e-5(e). *Where, as here, the only challenged employment practice occurs before the termination date, the limitations periods necessarily commence to run before that date.*

Id. at 259 (emphasis added).

Soon afterwards, in *Chardon v. Fernandez, supra,* this Court clarified and extended the *Ricks* holding. In an action brought under 42 U.S.C. § 1983 (1982), the *Chardon* Court summarily reversed an appellate decision holding that the limitations period for nontenured employees did not begin running until the employees' termination date:

> In *Ricks,* we held that *the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful.* The fact of termination is not itself an illegal act .... In the cases at bar, *respondents were notified,* when they received their letters, *that a final decision had been made to terminate their appointments. The fact that they were afforded reasonable notice cannot extend the period within which suit must be filed.*

454 U.S. at 8 (citation omitted) (emphasis added).[9]

B. The Decision Below That Addy's Final Termination Notice Did Not Begin the Limitations Period is Contrary to *Ricks* and *Chardon* and Conflicts with Decisions in Other Circuits.

The Ninth Circuit's decision in the present case disregards *Ricks* and *Chardon.* Those cases focused on the allegedly discriminatory *acts,* rather than the painful

---

[9] There is no question that the *Ricks-Chardon* rule applies to the ADEA. *See, e.g., Miller v. Internat'l Tel. & Tel. Co.,* 755 F.2d 20, 21 (2d Cir.), *cert. denied,* 474 U.S. 851 (1985); *Aronsen v. Crown Zellerbach,* 662 F.2d 584, 593 (9th Cir. 1981), *cert. denied,* 459 U.S. 1200 (1983).

consequences of such acts. The Ninth Circuit held, however:

> [T]here are material factual issues relating to whether a person meeting the *Boyd* test[10] would have considered the March 20 letter an act of termination. On its face the letter purports to offer [Addy] the opportunity to remain in the employ of the company, albeit in a different position and only upon a condition that might well prove illusory. Although the letter may be sufficient to put an individual on notice as to *some* act of discrimination, it is far from clear that it was sufficient to give appellant notice of his actual termination.

App. A at 16 (emphasis in original).

The Ninth Circuit's conclusion is contrary to *Ricks* and *Chardon*. General Telephone communicated in the March 20th letter *full notice* of its decision to remove Addy from his design artist position. This letter placed the onus of finding an alternative position on Addy. No further decision or action by General Telephone was required or implied thereunder. Whatever Addy might do, it was clear that he was to be removed from the job he held. Since Addy had rejected General Telephone's only offer of an alternative position, the March 20, 1981, letter merely gave Addy a reasonable thirty-day period to locate alternative

---

[10] In *Boyd v. United States Postal Service*, 752 F.2d 410 (9th Cir. 1985), the Ninth Circuit established as the time for filing a discrimination complaint that point at which "the facts that would support a charge of discrimination would have been apparent to a similarly situated person with a reasonably prudent regard for his rights." *Id.* at 414.

employment either within General Telephone or outside it. Addy adduced no facts contradicting the obvious portent of this document. The Ninth Circuit's conclusion that the search period provided by General Telephone extended the tatutory filing period is directly contrary to the teaching of *Chardon*. The allegedly discriminatory action — as opposed to its painful consequences — was final and definite on March 20, 1981, and there was no hint of any reconsideration of that decision by General Telephone.[11]

The decision of the Ninth Circuit conflicts with those of the Second, Fourth, Seventh, Eighth, and Eleventh Circuits. In *Price v. Litton Business Systems, Inc.*, 694 F.2d 963 (4th Cir. 1982), Litton informed employee Price on February 5, 1980, that he would be removed as branch manager of that company's Greensboro, North Carolina, office effective February 8th. Litton retained Price in a sales position for several weeks, however, and then placed him on personal leave of absence without pay for three months. Litton told Price " 'that other opportunities [within the company] . . . would be investigated for him,' " and that the company would " 'contact [him] with some concrete offers for [his] consideration.' " *Id.* at 964-65. Communications regarding alternative positions continued until April 14, 1980. Notwithstanding these communications and Litton's

---

[11] It should be noted that Addy's lawsuit is for termination of his employment as a design artist, not for an alleged discriminatory failure to find him some other job. In any event, in *Miller v. Internat'l Tel. & Tel. Corp., supra*, 755 F.2d at 25, the Second Circuit noted the Fourth and Fifth Circuits' holdings that, even if there were discrimination in the course of rehiring or reinstating an employee, such alleged discrimination would not delay, toll or waive limitations on a claim that an employer discriminated in making its initial decision to terminate. This distinction was wholly disregarded in the Ninth Circuit's opinion.

affirmative representations regarding efforts to find alternative employment positions within the company, and despite the temporary transfer to another position, the Court of Appeals for the Fourth Circuit held as a matter of law that the limitations period "began to run on February 5 when [Price] was told he would be relieved of his position." *Id.* at 965.

The *Price* court reasoned:

> We have recently held as a matter of law . . . that the attempt to mitigate the harshness of a decision terminating an employee, without more, cannot give rise to an equitable estoppel. See *Lawson v. Burlington Industries, Inc.*, 683 F.2d 862, 864 (4th Cir.), *cert. denied*, 103 S.Ct. 257 (1982). *The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.* An employee's hope for rehire, transfer, promotion, or a continuing employment relationship — which is all that Price asserts here — cannot toll the statute absent some employer conduct likely to mislead an employee into sleeping on his rights.

694 F.2d at 965-66 (emphasis added). Although Price, unlike Addy, at least had some specific facts to raise, he still had not raised a genuine issue of fact regarding any "deliberate design by the employer" or any "actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." The Fourth

Circuit affirmed a summary judgment, thus sparing the employer the cost and burden of a full trial on a stale claim.

The Ninth Circuit's interpretation of the *Ricks-Chardon* rule in the present case is also squarely in conflict with the view of the Seventh Circuit. In *Mull v. Arco Durethene Plastics, Inc.*, 784 F.2d 284 (7th Cir. 1986), the Seventh Circuit held that, after an employer had made a decision to remove an employee from his position, limitations began to run under *Ricks and Chardon*, notwithstanding subsequent periods of alternative employment and continuing offers of other, alternative positions.

In *Mull*, the employer informed the plaintiff in April 1979 that his performance had been inadequate and that he would be removed from his position as business manager effective May 14, 1979. At that meeting, the employer offered Mull the option of a new position at a different plant, or early retirement in lieu of immediate termination. On May 2nd, when Mull requested reconsideration of this decision, the employer orally told him that his removal as business manager "was not open for reconsideration." *Id.* at 285. Subsequently, however, the employer placed Mull on temporary special assignment until his December 31st termination date. Notwithstanding these various offers, options, and assignments, the Seventh Circuit upheld summary judgment for the employer, holding that the limitations period began to run on May 2, 1979, when Mull was notified that the decision to remove him *from his then-current position* was final and not open for reconsideration.

The Seventh Circuit in *Mull* echoed the Fourth Circuit's holding in *Price v. Litton, supra*, that equitable estoppel is limited to cases where there was a "deliberate design," or evidence of employer conduct that would "unmistakably" cause an employee to delay filing a charge. The court

stated: "[A]n employer's attempts to lessen the adverse impact of an employment decision will not as a matter of law serve to toll the limitations period. . . . Similarly, an 'employee's hope for rehire' or for 'a continuing employment relationship' in any capacity does not necessarily justify the exercise of equitable estoppel." 784 F.2d at 292 (citations omitted).

Decisions of other circuits are in accord with the Fourth Circuit's *Price* and Seventh Circuit's *Mull* decisions — and conflict with the Ninth Circuit's decision here — with regard to the equitable modification of limitations.

In *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983), the Eleventh Circuit held that offers of alternative employment did not support equitable estoppel. The court made it clear that the kind of conduct needed to invoke an estoppel " 'must be so misleading as to cause the plaintiff's failure to file suit' " *Id.* at 1532, n.6, citing *Sanchez v. Loffland Brothers Co.*, 626 F.2d 1228, 1231 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981). The Eleventh Circuit held equitable estoppel would not be proper, because "Disney never told Kazanzas that it would reinstate him in his old job, and did nothing to keep him from filing a lawsuit or seeking the advice of an attorney." *Id.* at 1532.[12]

---

[12] Even if tolling of a *charge-filing* limitations period were appropriate, *Kazanzas* also conflicts with the instant decision in specifically refusing to toll the *suit-filing* limitations period whenever there is ample time, following tolling, to file suit. The Eleventh Circuit noted that there are different considerations at work when the issue is tolling of the longer suit-filing limitations, rather than the much shorter EEOC administrative charge-filing period. *Id.* at 1529. The court declined to apply either equitable tolling or equitable estoppel to the longer suit-filing statute of limitations period:

In *Dillman v. Combustion Engineering, Inc.*, 784 F.2d 57 (2d Cir. 1986), the Second Circuit refused to find an equitable estoppel where the employer had offered the plaintiff various options for severance pay and outplacement services. Notwithstanding plaintiff's claims that these offers of severance benefits prevented him from exercising his rights, the court rejected an equitable modification of limitations argument:

> We . . . have been careful not to penalize by estoppel an employer who in good faith attempts to ameliorate the employee's termination by offers of severance payments and retirement benefits.
>
> . . . . The facts of the instant case, even when viewed in the light most favorable to appellant, do not present a jury question on his equitable estoppel claim. It is undisputed that [during the statutory period] appellee never mentioned the possibility of reinstatement to appellant. . . . Appellant's claim is based on allegations not of reinstatement but that appellee "dangled" the vesting of early retirement and increased severance payments before appellant to delay his EEOC filing. The record shows, however, that appellee's offers were not at all conditional or

---

Even if Disney's action constituted conduct sufficient to give rise to estoppel, Kazanzas' claim might not survive because his contacts with Disney ended approximately one and a half years before the expiration of the statute of limitations. "[I]f there is still ample time to institute the action within the statutory period after the circumstances inducing delay have ceased to operate, a plaintiff who failed to do so cannot claim an estoppel."

704 F.2d at 1531 n.4 (citation omitted).

> "dangled", but rather were *good faith attempts to ameliorate the effects of appellant's termination.* As indicated above, such efforts, *as a matter of law, never can provide the grounds for equitable estoppel.*

784 F.2d at 61 (emphasis added).

The Second Circuit in *Cerbone v. ILGWU*, 768 F.2d 45, 49 (1985), found no tolling or estoppel where the terminated employee "was fully aware that he had a potential age discrimination claim" and the employer extended the employee's benefits.[13] Relying on the Fourth Circuit's *Price v. Litton, supra,* the Second Circuit was "reluctant to fashion tolling or estoppel rules that would deter an employer who makes a decision to discharge or demote an employee from seeking to ameliorate the effects of that decision." *Id.* at 50 n.4.

Similarly, the Eighth Circuit adopted the Fourth Circuit's *Price v. Litton, supra,* approach in *Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2d 357 (8th Cir.), *cert. denied*, 469 U.S. 1036 (1984). The Eighth Circuit held that the "provision of severance benefits and job referrals" reveals "no deliberate conduct on the part of the employer to lull appellant into delaying the filing of his ADEA charge". *Id.* at 359.

Thus, no fewer than five circuits have established *as a matter of law* that equitable estoppel is available only where the employer's conduct (a) is objectively deceptive or misleading and (b) constitutes something other than an attempt to help ameliorate the impact of the employee's

---

[13] Like the plaintiff in *Cerbone*, Addy clearly knew that he had a potential age discrimination complaint, as he filed an administrative charge on March 16, 1981. Vol. I, Tab CR 25, p. 24.

termination. The panel opinion below is in direct conflict with these decisions (and with one Ninth Circuit panel decision)[14] because it ignores undisputed facts establishing that neither of these prerequisites for equitable estoppel has been met. Instead, the court labelled the estoppel issue as purely one of fact.[15] The Ninth Circuit's predisposition to treat equitable estoppel as being purely factual and almost always insulated from summary judgment completely undermines this Court's *Ricks-Chardon* rule and creates a substantive policy conflict with the precedent from other circuits.

C. The Ninth Circuit's Decision Disregards Other Circuits' Clear Holdings that Equitable Estoppel Is Not Available When A Claimant Has Counsel Or Is Otherwise Aware Of His Rights.

In its opinion in this case, the Ninth Circuit makes no reference to the fact that Addy had retained his present counsel even before his receipt of the March 20, 1981,

---

[14] In *Naton v. Bank of California*, 659 F.2d 691, 696 (9th Cir. 1981), another panel of the Ninth Circuit acknowledged the importance of "evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct." The decision below relied in part on *Naton*, but ignored this aspect of that holding. Rather, on this point, the Ninth Circuit here relied on a contradictory case which implies that tolling issues are easily raised making summary judgment "seldom . . . appropriate." *Aronsen v. Crown Zellerbach, supra*, 662 F.2d at 595. This confusion in Ninth Circuit precedent further attests to the need for clarification of the equitable estoppel issue by this Court, lest the instant case make equitable estoppels an almost universal bar to expeditious resolution of otherwise time-barred discrimination cases in the nation's largest circuit.

[15] As in *Aronsen v. Crown Zellerbach, supra*.

notice of termination. Vol. I, Tab CR 35, p. 251, Line 7-9, 20-22. On this point there is *broad* disagreement between the Ninth Circuit, on one hand, and the apparent majority view as applied in the First, Second, Third, Fourth, and Fifth Circuits.

In *Leite v. Kennecott Copper Corp.*, 558 F.Supp. 1170, 1174 (D. Mass.), *aff'd*, 720 F.2d 658 (1st Cir. 1983), the district court assembled a list of decisions from courts in four circuits and stated: " 'The courts have repeatedly held that equitable tolling is inappropriate when the plaintiff has consulted counsel during the statutory limitation period.' "

After the March 1983 decision in *Leite, supra*, additional circuit panel and en banc decisions have endorsed this rule. In *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 755 (3d Cir.) *cert. denied*, 464 U.S. 852 (1983), for example, an *en banc* Third Circuit made it clear that equitable tolling is inappropriate when an employee has counsel.

Similarly, in *Miller v. Internat'l Tel. & Tel. Corp., supra*, the Second Circuit held that equitable tolling is inapplicable "unless the employee was actively misled" (755 F.2d at 24), and the court refused to find deception or misleading conduct when the employee himself was an attorney (*id.* at 26). The Second Circuit finds tolling particularly inappropriate when an employee, like Addy, "was represented by counsel at an early stage" (*id.* at 26, n.4). In *O'Malley v. GTE Service Corp.*, 758 F.2d 818, 822 (2d Cir. 1985), Circuit Judges Feinberg, Friendly, and Kaufman again made it clear that estoppel requires evidence "of deliberate misconduct or bad faith," and is not applicable where an attorney is involved (in that case, again, as the plaintiff).

Recently, the Fourth Circuit has stated flatly, "*retaining an attorney extinguishes the equitable reasons for tolling.*"

Morse v. Daily Press, Inc., 826 F.2d 1351, 1353 (4th Cir. 1987) (emphasis added).

The Ninth Circuit's disregard for Addy's knowledge of his rights through his representation by counsel demonstrates the extent of the split in the circuits. Other circuits precondition a finding of estoppel on very definite deceptions or seriously misleading employer conduct. (*See e.g., Miller v. Internat'l Tel. & Tel. Co., supra,* 755 F.2d at 24.) Cases that have found estoppel or tolling have been distinguished as either involving actual concealment of an employee's cause of action or misrepresentation that a possible settlement was pending. *Cerbone v. ILGWU, supra,* 768 F.2d at 49-50. In the present case, the Ninth Circuit extends equitable tolling or estoppel to the case of an employee who believed he was being discriminated against, and who was "fighting back" in earnest with counsel who was in frequent contact with state and federal agencies.[16]

It is additionally worthy of note that Addy's counsel did not even meet the usual two-year statute of limitations. To the contrary, she waited until the third anniversary of Addy's actual departure from the job. Dilatory conduct of this type has been held to be relevant in an equitable modification analysis. *Miller v. Internat'l Tel. and Tel. Corp., supra,* 775 F.2d at 25. The Ninth Circuit's decision

---

[16] The Ninth Circuit not only ignored the presence of counsel, but further ignored the significance of Addy's filing of a formal discrimination complaint on March 16, 1981 (App. A at 8). In that complaint, Addy claimed that he had been strongly urged "to take a lesser position" under the threat of having no job at all. Vol. I, Tab CR 25, p. 24. By any reasonable definition, those are not the words of a person who has been lulled into not exercising his rights. This clear evidence that Addy knew his rights would have been determinative in other circuits. *See, e.g., Kriegesmann v. Barry-Wehmiller Co., supra.*

gives decisive weight to the interests of a dilatory attorney, and no consideration whatsoever to the employer's right to repose, which was emphasized in *Ricks*. Indeed, the Ninth Circuit's approach conflicts directly with the Fifth Circuit's observation in *Edwards v. Kaiser Aluminum & Chemical Sales Inc.*, 515 F.2d 1195, 1200 n. 8 (5th Cir. 1975), that equitable modification is "singularly inappropriate" where it would result in overriding an employer's rights in order to protect a claimant's dilatory attorney.

D. The Ninth Circuit's Decision Is Irreconcilable With This Court's Recent Teachings on the Utility of Summary Judgment.

In order to fully appreciate the degree to which the Ninth Circuit's decision here is at odds with this Court's recent teachings on the utility of summary judgment, five undisputed and undisputable facts should be reiterated briefly. First, the termination notice itself neither promised nor alluded to any efforts whatsoever by General Telephone to find Addy another position. Rather, the letter placed the onus directly on respondent, stating:

> [Y]ou are given until April 20, 1981 to find a position within the company for which you may be qualified. If you fail to find placement within that time, you will be released from employment with General Telephone Company.

Second, Addy indisputably already believed that his supervisors were trying to force him out because of his age — he had months earlier filed a formal internal grievance containing this allegation. Third, Addy conceded in deposition that the February 23, 1981, offer of alternative

employment was communicated to him as a "last chance" offer, and when he refused this offer on March 10, 1981, he understood that he was "getting his ass kicked out the door." Fourth, Addy filed a DFEH charge alleging age discrimination four days before he received the March 20th letter. Fifth, as the Ninth Circuit expressly recognized, Addy *admitted* in deposition that all of General Telephone's alleged reassurances regarding alternative employment *ended upon Addy's receipt of the March 20, 1981, letter.* App. A at 16.

Addy's patently irrational hope that somehow, someday General Telephone would locate a job for him — when *all* of the uncontroverted evidence after the March 20 termination notice is contrary — is precisely the kind of nonissue that can no longer bar summary judgment. The Ninth Circuit's refusal to examine the *reasonableness* of Addy's belief is clearly at odds with this Court's holding in *Anderson v. Liberty Lobby, Inc., supra,* 106 S.Ct. at 2512, that a court should determine whether a jury "could reasonably find for the plaintiff. The judge's inquiry . . . unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . ." Indeed, where, as here, a nonmoving party's claims are *implausible,* that party must present "specific facts" even more persuasive than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., supra,* 106 S.Ct. at 1362. As this Court instructed lower courts in *Celotex Corp. v. Catrett, supra,* 106 S.Ct. at 2555, summary judgment is *not* "a disfavored procedural shortcut."

The Ninth Circuit's refusal to uphold the trial court's summary judgment here, in reliance on old Ninth Circuit

authority that summary judgment is "seldom . . . appropriate" when tolling issues are raised, *Aronsen v. Crown Zellerbach, supra,* is simply in flat derogation of this Court's 1986 summary judgment trilogy and should be summarily reversed.

CONCLUSION

For all the forgoing reasons, and particularly because the Ninth Circuit's decision is directly contrary to this Court's decisions in *Ricks, supra,* and *Chardon, supra,* it is respectfully requested this Court should grant the writ and summarily reverse the decision of the Ninth Circuit.

Dated: October 29, 1987

Respectfully submitted,

Paul Grossman*
J. Al Latham, Jr.
Paul, Hastings, Janofsky
& Walker

Mark F. Sullivan
General Telephone
Company of California

Counsel for Petitioners

* Counsel of Record

APPENDIX A

Evelyn McCONNELL and
Floyd Ray Addy,
Plaintiffs-Appellants,

v.

GENERAL TELEPHONE COMPANY
OF CALIFORNIA, et al.,
Defendants-Appellees.

Nos. 85-6352, 85-6354.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 6, 1986.
Decided April 10, 1987.

Two employees filed federal age discrimination actions. The United States District Court for the Central District of California, Laughlin E. Waters, J., granted summary judgment against the employees in the two actions. Employees appealed. The actions were consolidated. The Court of Appeals, Muecke, District Judge, sitting by designation, held that: (1) fact that employee requested right-to-sue letter from state agency prior to expiration of time period for review of her age discrimination charge did not lead to conclusion that employee failed to exhaust her administrative remedies prior to bringing federal action; (2) employee did not "frustrate the statutory scheme" in the Age Discrimination in Employment Act by filing both state and federal age discrimination actions; (3) genuine issue of material fact, concerning employee's reliance upon alleged

assurances by employer's internal agency set up to investigate claims of discrimination, precluded summary judgment for employer; and (4) genuine issue of material fact, concerning date on which employee's retaliation claim accrued, precluded summary judgment for employer.

Decisions reversed, judgments vacated, and actions remanded.

1. Civil Rights 32(1)

Fact that employee, who had filed age discrimination charge with the California Department of Fair Employment and Housing, requested right-to-sue letter from the DFEH prior to expiration of time period for review of the charge did not lead to conclusion that employee failed to exhaust her administrative remedies prior to filing federal age discrimination action against employer.

2. Civil Rights 38

Right-to-sue letter issued by the California Department of Fair Employment and Housing was entitled to presumption of regularity in federal action filed under the Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

3. Civil Rights 38

Employee, who filed age discrimination charge with the California Department of Fair Employment and Housing justifiably relied, in employee's state court age discrimination action against employer, on right-to-sue letter issued by the DFEH, even if it were error for the DFEH to issue the letter immediately after employee filed the charge with the DFEH.

4. Civil Rights 40

Employee's filing of age discrimination charge with the California Department of Fair Employment and Housing was deemed to be filing with the Equal Employment Opportunity Commission, for purposes of determining whether employee complied with 60-day waiting period in the Age Discrimination in Employment Act prior to filing federal age discrimination action; deferral agreement existed between California and the EEOC in which the EEOC agreed to defer California cases to the DFEH for preliminary investigation. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 7(d), as amended, 29 U.S.C.A. §§ 621 et seq., 626(d).

5. Judgment 828(3.16)

Potential for res judicata or collateral estoppel resulting from employee's state age discrimination action was only speculative, at best, where state action had not concluded; therefore, doctrines of res judicata and collateral estoppel were not ripe for consideration in employee's federal age discrimination action.

6. Civil Rights 38

Employee, who filed both state and federal age discrimination actions, did not "frustrate the statutory scheme" contained in the Age Discrimination in Employment Act; both actions were properly filed. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

7. Limitation of Actions 13

Representations of possible alternative employment within the company may toll the statute of limitations for filing federal age discrimination action under the doctrine of equitable estoppel when the representations lull the

employee into untimely filing. Age Discrimination in Employment Act of 1967, § 7(e)(1), as amended, 29 U.S.C.A. § 626(e)(1); Portal-to-Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

8. Federal Civil Procedure 2497

Genuine issue of material fact, as to whether employee's reliance upon alleged reassurances by employer's internal agency set up to investigate claims of age discrimination was reasonable, precluded summary judgment for employer in employee's federal age discrimination action.

9. Federal Civil Procedure 2497

Genuine issue of material fact, as to whether employee should have reasonably considered letter from employer as act of termination, for statute of limitations purposes, precluded summary judgment for employer in employee's federal age discrimination action. Age Discrimination in Employment Act of 1967, § 7(e)(1), as amended, 29 U.S.C.A. § 626(e)(1); Portal-to-Portal Act of 1947, § 6(a), 29 U.S.C.A. § 255(a).

10. Federal Civil Procedure 2497

Genuine issue of material fact, as to date on which employee's claim for retaliation accrued, precluded summary judgment for employer in employee's federal age discrimination action.

Ida L. Campbell-Thomas, West Covina, Cal., for plaintiffs-appellants.

Mark Sullivan, Thousand Oaks, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before REINHARDT and HALL, Circuit Judges, and MUECKE,* District Judge.

MUECKE, District Judge:

Evelyn McConnell and Floyd Ray Addy appeal from the district court's grant of summary judgment in each of their actions concerning age discrimination. These matters were consolidated for appeal due to the related nature of the facts and the parties. McConnell's action was dismissed for her failure to exhaust administrative remedies, the district court finding that she had thwarted the statutory scheme set out by EEOC for conciliation. Addy's action was dismissed based upon the running of the three-year statute of limitations set forth in 29 U.S.C. § 626. We reverse the trial court's ruling in both matters.

FACTS

Evelyn McConnell

Plaintiff/Appellant was employed with the defendant/appellee as a drafter in 1964 and in 1977 was upgraded to the management position of "Design Artist I." She retired in November 1982 pursuant to an incentive plan for early retirement. During her employment, she was reprimanded several times for her excessive absenteeism and placed on disciplinary follow-up during 1980-81. During the latter years of her employment, plaintiff contends that although she was classified as a Design Artist I, her work consisted mainly of work performed by those in the position of Design Artist II.

---

* Honorable Carl A. Muecke, Senior United States District Judge, District of Arizona, sitting by designation.

Appellant contends that positions for Design Artist II were opened and filled during May and July of 1981 and that despite her qualifications for the position and her performance of those tasks in her present position, she was not considered for the openings. She contends that she became aware of the reasons that she was not considered for the openings on June 2, 1982, and filed a charge with the California Department of Fair Employment and Housing ("DFEH") on July 6, 1982. She was over the age of forty-five at the time of filing the charge and was represented by counsel. On the same day, appellant requested that the DFEH withdraw her charges.

Appellant contends that the DFEH granted her a "right-to- sue" letter on July 19, 1982, although the DFEH did not close its file on this matter until July 23, 1982, indicating that appellant had "elected court action." On July 20, the appellant filed suit in Los Angeles Courty Superior Court alleging discrimination on the basis of sex and age, breach of employment agreement, wrongful interference with a business relationship, breach of covenant of good faith and fair dealing in violation of California Labor Code § 1197.5 and intentional infliction of emotional distress.

On May 24, 1984, appellant filed suit in the U.S. District Court, Central District, alleging a violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621-34. After denying a motion to dismiss on October 9, 1984, on the basis that there was evidence of continuing violations, the district court granted appellee's motion for summary judgment on September 23, 1985, finding that the appellant had failed to exhaust her administrative remedies. He also dismissed all pending state law claims. Appellant's state court discrimination action still remains. A judgment for dismissal in this action was filed on October 30, 1985.

Appellant filed timely notice of appeal on December 2, 1985.

Floyd Ray Addy

This plaintiff-appellant was also employed in the graphic department of the defendant-appellee General; however, he was in the position of Design Artist II at the time of his termination. He was employed with the appellee since 1972, beginning as a "Technical Illustrator" and then upgraded to Design Artist II in 1977. Although his evaluations were "good" during the majority of his employment, they fell to "fair" or "at minimum expectations" during the latter portion of his time with General. On May 7, 1980, appellant received an unfavorable review, at which time he advised the EO Department of General (an internal agency set up by the company to investigate claims of discrimination) that his supervisors were attempting to force him to retire at age sixty-five. On July 3, 1980, appellant filed a formal complaint with the EO Department, leading to several interviews with the appellant, his supervisors, and members of the EO Department.

On December 17, 1980, appellant's sixty-fifth birthday, he received a disciplinary memo dated December 5, 1980, indicating dissatisfaction with appellant's work and providing for a review in ninety days. The memo also indicated that if his performance did not improve during this time, he would be reclassified to a level more commensurate with his skills (or released if no vacancy existed). During the following ninety days, appellant made several serious errors in his employment and in February 1981, one of his supervisors offered appellant another position, indicating that it was his "last chance." Appellant did not respond to the offer.

On March 16, 1981, appellant filed discrimination charges with DFEH. Appellant was informed on March 20, 1981, that his work was not up to the accepted levels of performance and that he would have to find another position in General by April 20, 1981, or would be released. Appellant left work on April 20th and brought a state court action on October 20, 1982. He obtained his right-to-sue letter from the EEOC on June 13, 1983, and brought an action in the district court on April 16, 1984.

After denying a motion to dismiss in this matter on October 9, 1984, based upon a finding of continuing violations, the district court granted a subsequent motion for summary judgment on September 23, 1985, grounded on the running of the statute of limitations. The court also dismissed all pendent state law claims. Appellant's action in state court still remains. Appellant filed a timely notice of appeal on October 2, 1985.

ISSUES PRESENTED

1. Did the district court err in dismissing McConnell's ADEA action for failure to exhaust administrative remedies where McConnell filed and then "withdrew" her state administrative claims by prematurely requesting and obtaining a right-to-sue letter.

2. Did the district court err in dismissing Addy's ADEA complaint as untimely because the statute of limitations had run?

DISCUSSION

STANDARD OF REVIEW

We review a district court's decision to grant summary judgment *de novo*, *see Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983), and affirm such a decision if, viewing the evidence presented in the light most favorable to the nonmovant, there exists no genuine issue of material fact and the movant is entitled to prevail under its claim. *See Friends of Endangered Species, Inc., v. Jantzen*, 760 F.2d 976, 981 (9th Cir.1985).

EXHAUSTION OF ADMINISTRATIVE REMEDIES — McCONNELL

Pursuant to the provisions of the ADEA concerning the right to bring such actions, 29 U.S.C. § 626(d) provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed —
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which [29 U.S.C. § 633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as

prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

In the McConnell case, appellant filed charges with the DFEH on July 6, 1982, immediately requesting a right-to-sue letter from the DFEH on July 19, 1982. She then filed an action in state court on July 20, 1982, only fourteen days after filing charges. Subsequently, appellant brought an action under the ADEA, 29 U.S.C. § 621, et seq., in federal district court after receiving her right-to-sue letter from the EEOC. In considering these facts the district court found that the appellant had frustrated the statutory structure for the filing of such claims by illegally withdrawing her claim from the DFEH. The court further found that the EEOC'S adoption of the state agency's finding, which in this case amounted to nothing because the DFEH had made no finding, was the result of mistaken conduct, precluding the existence of jurisdiction in federal court.

[1-3] Appellant disputes the district court's decision on several grounds. First, relying upon our previous decision of *Carter v. Smith Food King*, 765 F.2d 916 (9th Cir. 1985), she correctly points out that the facts that she requested a right-to-sue letter prior to the expiration of the time period for review does not lead to the conclusion that appellant has failed to exhaust her administrative remedies. *Id.* at 923. Further, "[t]he administrative agency's right-to-sue letter is entitled to a presumption of regularity." *Id.* Finally, *Carter* also states that "when a state agency charged with administering a particular statute determines that an individual has the right to sue under that statute and so informs him, the claimant may justifiably rely on the agency's representation, even if the state agency is in error."

Id. at 924. *See also Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 762-65, 99 S.Ct. 2066, 2074-76, 60 L.Ed.2d 609 (1979) (holding that although state action must be sought prior to bringing suit under the ADEA, it was sufficient to simply file a complaint with that commission and the fact that it might be denied for failure to comply with state procedural guidelines was of no consequence); Annot., 56 A.L.R.Fed 627 (1982).

Accordingly, any notion that the state agency acted in error in providing the appellant with a right-to-sue letter immediately after charges were filed is foreclosed on the basis of *Carter* and *Oscar Mayer,* as long as appellant did file her complaint with the state agency.

[4] While it is clear under *Carter* that appellant could properly seek relief under the state code upon receipt of the DFEH right-to-sue letter, there is no authority on the effect of those actions upon the requirements of ADEA, namely the sixty-day waiting period. Appellant contends that pursuant to EEOC regulation 29 C.F.R. § 1626.10(c), the filing of a charge with one agency is "deemed" to be a filing with both (i.e., the state agency and the EEOC). Under this rationale, the filing with DFEH on July 6, 1982, was effective for the EEOC filing and the waiting period in 29 U.S.C. §626(d)(2) ran from the date of the receipt of the right of refusal letter for DFEH. Further, appellant contends that by the time that she had filed her federal action almost two years later, the EEOC had been given sufficient time for conciliation and had properly issued a right- to-sue letter.

A literal reading of § 626(d) supports appellant's position. In the instant case, appellant did not bring an action "under this section" [29 U.S.C. § 626] until after the EEOC had issued a right-to-sue letter. This action would

then be in accordance with § 626(d). The fact that she previously filed a state court action under a state statute does not alter this result, as the state commission was given the opportunity to investigate prior to the filing of that action. Accordingly, as both the state and federal court actions were properly filed, the two actions combined do not "frustrate the statutory scheme."

Appellee's citations to authority on this issue are not to the contrary. For example, several circuits have found that the sixty-day period in § 626(d) is jurisdictional and the failure to comply should result in the dismissal of the action. *See Vance v. Whirlpool Corp.*, 707 F.2d 483, 489 (4th Cir.1983), *cert. denied* 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 873 (1984); *Wright v. State of Tennessee*, 628 F.2d 949, 953 (6th Cir.1980) (en banc); *Reich v. Dow Badische Co.*, 575 F.2d 363, 367-68 (2d Cir.), *cert. denied*, 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978); *Cannon v. University of Chicago*, 559 F.2d 1063, 1076-77 (7th Cir.1976), *rev'd in part and remanded on other grounds*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). Nevertheless, there has been no showing that appellant failed to comply with this requirement.

[5] Appellee does make several contentions in regard to this disposition. First, it argues that a state court action may have broader remedies than those available under ADEA, citing *Kelly v. American Standard, Inc.*, 640 F.2d 974, 983 (9th Cir.1981), and correctly points out that a state court determination on the claims contained in the appellant's state court complaint would bar a subsequent federal suit on the same issues. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485, 102 S.Ct. 1883, 1899, 72 L.Ed.2d 262 (1982). Nevertheless, this court need not address this claim. The potential for *res judicata* or collateral estoppel is

only speculative, at best, as the state court action has not concluded. Until such time as these doctrines are applied to the parties, this matter is not ripe for consideration by this court.

Appellee further contends that the filing of the charge with DFEH should not be deemed a filing with the EEOC under the circumstances present here notwithstanding the EEOC regulations which provides for this result, 29 C.F.R. § 1626.10(c). General cites two Fifth Circuit decisions which hold that filings with other agencies do not constitute filings with the EEOC. *See Taylor v. General Telephone Co.*, 759 F.2d 437, 440-42 (5th Cir.1985); *Chappell v. Emco Machine Works Co.*, 601 F.2d 1295, 1303-4 (5th Cir.1979). These decisions are distinguishable from the case at hand in a critical respect. In *Taylor* and *Chappell*, the states involved were not deferral states utilizing word sharing agreements.

The facts involved herein occurred in California, a deferral state under the ADEA. A deferral state is one to which the EEOC has agreed to defer cases for preliminary investigation; here the agency is the DFEH. When a deferral agreement exists, the regulation regarding simultaneous filing, 29 C.F.R. § 1626.10(c), will be enforced. *See Stearns v. Consolidated Management, Inc.*, 747 F.2d 1105, 1112-14 (7th Cir.1984); *Stoecklein v. Illinois Tool Works, Inc.*, 589 F.Supp. 139, 144-45 & n.7 (N.D.Ill.1984). Enforcement of the regulation is consistent with the idea that

> [t]he ADEA is humanitarian legislation that should not be construed in a hypertechnical manner. Under the ADEA the wheels of justice are set in motion by laymen, and we are loath to

> adopt a reading of the ADEA that makes this task any more difficult than it already is.

Stearns, 747 F.2d at 1112. Use of the regulation avoids the unnecessary burden and duplication of filing separate claims with both the state and federal agencies. It also encourages reliance upon work sharing agreements, resulting in a reduction of the strain placed upon these agencies to meet the overwhelming demands for investigation.

[6] In light of the above discussion, appellee's argument against the use of the regulation is unpersuasive. Therefore, the district court was erroneous in holding that appellant had not exhausted her administrative remedies as required by 29 U.S.C. § 626(d) and had thwarted the statutory scheme. Accordingly, the trial court's ruling on this matter is reversed and the case remanded for further proceedings.

STATUTE OF LIMITATIONS — ADDY

Appellant Addy was required to being his action for alleged violations of ADEA within three years of the violative acts. *See* 29 U.S.C. § 626(e)(1), incorporating by reference 29 U.S.C. § 255(a). At the hearing on the motion to dismiss, the court found that "[appellant] was told clearly and indisputably that he was going to be terminated . . . at least as early as March 20, [1981]." His federal court action was not filed until April 16, 1984, more than three years after the occurrence of the events giving rise to his claims.

Appellant challenges the district court's findings, claiming that the letter of March 20, 1981, to which the judge was obviously referring in his discussion on the motion, contained equivocal language and was not sufficiently definite. On December 17, 1980, appellant

received a disciplinary memorandum which indicated, in part, that if he did not improve the quality of his work, he would "be reclassified to an available position more commensurate with [his] skill level. If no vacancy exists, [he] may be released." A subsequent letter on March 20, 1981, indicated the following: "[Y]ou are given until April 20, 1981, to find a position within the company for which you may be qualified. If you fail to find placement by that time, you will be released from employment with General Telephone Company." Appellant contends that this language is similar to that addressed in the matter of *Verschuuren v. Equitable Life Assurance Society of the United States*, 554 F.Supp. 1188 (S.D.N.Y. 1983). In that case a letter was given to an individual which indicated that his job had been abolished and that if he was not placed in another position with the company, he would be terminated. However, that letter differs from the March 20th letter herein in that it contained the following statement; "Please be assured that every reasonable effort will be made to place you in a position . . . ." 554 F.Supp. at 1190 n.1.

In making the determination of the appropriate filing date for complaints of this nature, this court follows the guidelines as set forth in *Boyd v. United States Postal Service*, 752 F.2d 410, 414 (9th Cir.1985) (citations omitted):

> The time for filing a complaint of discrimination begins to run when the facts that would support a charge of discrimination would have been apparent to a similarly situated person with a reasonable prudent regard for his rights.

In the present case, appellant argues that he was misled by General in regard to his termination. He claims that while the EO Department was actively providing him with

reassurances, in reality they were actively working with others in General to terminate him.

[7,8] Although Addy admitted in his deposition that those alleged reassurances ended upon Addy's receipt of the March 20, 1981 letter, he also stated that he believed that the EO Department would notify him at home concerning the new position that they were trying to locate for him at General. Representations of possible alternative employment within the company may toll the statute of limitations under the doctrine of equitable estoppel when the representations lull the employee into an untimely filing. *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 595 & n. 22 (9th Cir.1981) (citing cases), *cert. denied*, 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed.2d 431 (1983); *see also Cooper v. Bell*, 628 F.2d 1208, 1214 (9th Cir.1980) (listing elements of estoppel in Title VII action). The reasonableness of appellant's reliance upon these alleged reassurances is a matter not properly decided in the first instance by this court. *See Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir.1981).

[9] Similarly, there are material factual issues relating to whether a person meeting the *Boyd* test would have considered the March 20 letter an act of termination. On its face the letter purports to offer appellant the opportunity to remain in the employ of the company, albeit in a different position and only upon a condition that might well prove illusory. Although the letter may be sufficient to put an individual on notice as to *some* act of discrimination, it is far from clear that is was sufficient to give appellant notice of his actual termination. The statutory period for complaining of a discriminatory termination does not begin to run until the employee has sufficient notice of that specific act. Notice of other discriminatory conduct such as a possible

transfer or demotion ordinarily is not enough to start the statute running on a claim of unlawful discharge. *See, e.g. Aronsen*, 662 F.2d at 593.

[10] Turning to Addy's claim that General refused to find him another position within the company in retaliation for the charges he filed with the DFEH, we find that here remains a question of fact regarding the date on which this claim accrued under *Ricks*. General presented evidence that Addy was offered an alternative position within General, and informed on February 23, 1980, that if he did not take the alternative position no other positions would be offered. As noted above, however, Addy testified at his deposition that the representations of alternative employment within General by the EO Department continued until the time of his termination, and that he believed even after his termination that the EO Department would find him an alternative position. Under these circumstances there remains question of fact regarding when Addy received notice of General's decision not to offer him alternative employment.

CONCLUSION

In regard to the McConnell matter, this court finds that appellant did exhaust her administrative remedies prior to bringing her federal cause of action without "frustrating the statutory scheme." Accordingly, the decision of the district court is REVERSED, the entry judgment is VACATED, and this matter is REMANDED to the district court for further proceedings.

The district court's decision in Addy is also REVERSED based upon the existence of genuine issues of material fact concerning appellant's reliance upon alleged assurances by

appellee's EO Department, and the date on which Addy's retaliation claim acccrued. Therefore, the judgment in this matter is VACATED and the action REMANDED for further consideration in accordance with this disposition.

In addition, as the district court dismissed the state law claims in each of these actions on the basis that no federal cause of action remained, these claims are to be reinstated upon remand of these matters, subject to the defenses available to General in that regard.[1]

---

[1] Appellants' briefs discuss the possibility of tolling the statute of limitations in Title VII actions. However, the amended complaints in both of these actions neither seek relief from Title VII nor contain any allegations or citations concerning Title VII. As the complaints do not raise these issues, we need not address whether any such claims could be barred by the statute of limitations.

General argues that we should affirm the grant of summary judgment by reviewing the merits of Appellants' claims even if we find that the district court erred in the reasons it asserted in dismissing the claims. We decline this offer, leaving consideration of the appropriateness of summary judgment on the merits of the claims presented to the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV 84-2676-LEW Date Sept. 23, 1985

Title FLOYD RAY ADDY
-v-
GENERAL TELEPHONE COMPANY
OF CALIFORNIA

DOCKET ENTRY

PRESENT:

HON. LAUGHLIN E. WATERS, JUDGE

Carolyn Jackson/Marva Dillard — Deputy Clerk
Donna Baird — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Ida L. Campbell-Thomas

ATTORNEYS PRESENT FOR DEFENDANTS:
Mark Sullivan

PROCEEDINGS:

DEFENDANTS', GENERAL TELEPHONE CO., BOWSER & SAYRE, MOTION FOR SUMMARY JUDGMENT

Cause called. Hearing held. Court dismisses matter based on the statute of limitations is run.

Further, the court orders pendent state claims dismissed.

(Enter) JS-6

ENTERED
SEP 30 1985
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

MINUTES FORM 11 Initials of Deputy Clerk CJ
CIVIL-GEN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE LAUGHLIN E. WATERS,
JUDGE PRESIDING

FLOYD RAY ADDY,
Plaintiff,

vs. No. CV 84-2676-LEW (JRx)

GENERAL TELEPHONE
COMPANY OF CALIFORNIA, et al.,
Defendants.

EVELYN MC CONNELL,
Plaintiff,

vs. No. CV 84-3829-LEW (JRx)

GENERAL TELEPHONE
COMPANY OF CALIFORNIA, et al.,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, SEPTEMBER 23, 1985

DONNA S. BAIRD, CSR 3591
Official Court Reporter
430 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 621-2400

APPEARANCES:

For the Plaintiffs:

LAW OFFICES OF LEE E. EPHROSS
AND IDA L. CAMPBELL-THOMAS
IDA L. CAMPBELL-THOMAS
590 East Mission Boulevard
Pomona, California 91766
(714) 623-8587

For the Defendants:

MARK F. SULLIVAN
100 Wilshire Boulevard
P.O. Box 889, RC 3300
Santa Monica, California 90406
(805) 372-6233

LOS ANGELES, CALIFORNIA; MONDAY, SEPTEMBER 23, 1985; 9:00 A.M.

THE CLERK: Item No. 5: CV 84-2676-LEW, Floyd Ray Addy vs. General Telephone Company of California and No. 6: CV 84-3829-LEW, Evelyn McConnell vs. General Telephone Company of California.

Counsel, please state your appearances for the record.

MS. CAMPELL-THOMAS: Good morning, your Honor. Ida Campbell-Thomas on behalf of plaintiffs Floyd Ray Addy and Evelyn McConnell and responding party.

MR. SULLIVAN: Mark Sullivan on behalf of the moving party.

THE COURT: All right, in connection with Floyd Ray Addy, is there anything you care to add in that case that you haven't put in your papers?

MR. SULLIVAN: Yes, your Honor. Two points. I would note that recently, it's in the last two-and-a-half weeks, the California Court of Appeal has issued an opinion which adopts for California wrongful discharge, the pendent claims, the same type of special burden of proof such as the federal courts have adopted in federal age discrimination and employment act claims. The case is Clutterham vs. Coachmen Industries at 169 Cal.App.3d 1223, and it appears that the California courts are saying again because an employer has to have discretion to run his business, that in order to avoid summary judgment, a plaintiff is going to have to show specific facts from which a reasonable man could find that there was pretext and not a good faith business reason.

The second point I bring up is I noted last night the first time — I didn't catch it it before — that on Page 12 of the memorandum of points and authorities that there's a

typographical error. We indicate there that General Telephone became aware of the fact that its policy conforming with state law was, in fact, in conflict with ADEA, that that was brought to our attention in January '81. In fact, it was January '80, which is quite crucial, because the company has its conciliation in May of '80.

THE COURT: Okay.

MS. CAMPBELL-THOMAS: In response to Mr. Sullivan's making the Court aware of the new case, Clutterham — first of all, I don't know — since I haven't read the case as yet — whether the courts have inferred that this new case should be retroactively applied to cases now pending or not. I would have the Court take notice of that.

Secondly, we do believe that we have established sufficient facts from all of the exhibits that were submitted to the Court to support our contentions that Mr. Addy was wrongfully discharged, and I would like to make a few remarks in regards to General Telephone's reply to our opposition.

Number one, General Telephone argues that we have the burden of producing specific facts, and we have not met that burden. We do believe that we have.

I think, again, that the attorneys for General Telephone misstated the facts as they relate to the plaintiff's statement that he had more error rates than anyone else in his unit. I think the transcript excerpts from the depositions submitted and also the documents clearly indicate first of all that only the two oldest persons in the department were — their production, work production and work products — were reviewed for errors. The other three younger persons who worked in the department were not reviewed with any kind of regularity or if at all for error rates.

Secondly, we produced documents from Lenore Bowser — that was a supervisor at the time of the incidents — in which one of the young men who was working the same time Mr. Addy was and who was not reviewed for errors, as her deposition states, had been commented in her notes for making severe errors.

So, I think, first of all, the question of whether Mr. Addy made errors more than the others in the department needs to be determined by the trier-of-fact at the time of trial.

Secondly, I think, as Mr. Addy stated that he believed that his error rate was increased due to harrassment by Ms. Bowser in relation to his work product because of his age, that also leaves a statement of issues of fact to remain to be tried and determined by a trier-of-fact.

So I think that Mr. Sullivan's contentions in the first part, that plaintiff has admitted that his error rate was substantially more than others and is, therefore, conclusive, then a summary judgment should be granted, is inappropriate and not totally in line with the facts as presented to the Court.

Secondly, I think Mr. Sullivan's standards as he relates to on Page 2 of his reply in regards to the rights to dictate a satisfactory work, that they have the right to do that, I think one of the things we learn about taking all of these depositions is that the policies regarding absenteeism, regarding error rates, et cetera were purely subjective on the part of the supervisor. Whether she chose to implement or discipline an employee for either chronic absenteeism or error rates was up to her. There was no set standards, per se, and given the fact that she did not review the younger person's work products for error rates would leave one to believe, first of all, that there was some discrimination in regards to how she treated her older employees as opposed

to her younger ones. This is clearly an issue of fact. I think we submitted quite a few documents to support that in regards to testimony, Ms. Bowser's notes et cetera.

Further, Mr. Sullivan makes known that the date of the policy changes was in May of 1980. Yet we have clear testimony in depositions that have been submitted to the Court, in one that was taken by Mr. Sayer, whose deposition we did not get back until after the papers have been submitted, clearly indicates, especially with Mr. Gonzales, who was the EO representative, that the defendants were using a policy for age. Mr. Sayer and Ms. Bowser both stated that the defendants were tolerating Mr. Addy until he reached 65, that he had been constantly making these errors and they just were waiting until he reached 65, and then let him retire gracefully.

At that point Mr. Addy informed them that he was not going to retire at 65, their depositions state that they began to crack down on him, setting up a different standard.

I think it's also mentioned by Mr. Gonzales that there was another employee who also had reached 65 and was terminated.

THE COURT: Excuse me.

Without reviewing all the evidence, I would like you to address the statute of limitations question which concerns me very much here.

When did Mr. Addy first learn that he was going to be terminated?

MS. CAMPBELL-THOMAS: Our contention is that Mr. Addy — he got notice that he was going to be terminated in April — I mean, in — I believe it was June or July. Not that he was going to be terminated, but he was subject to review. He got notice that he was going to be

supposedly terminated if things did not improve in December.

THE COURT: Wasn't he told to pack up and get out well prior to that time?

MS. CAMPBELL-THOMAS: Your Honor, he was told —

THE COURT: Wasn't he?

MS. CAMPBELL-THOMAS: He was told to pack up and get out in April of '81.

However, I wish to direct the Court's attention that at that time, he was still getting assurances from the EO Department, that they were going to find him a job.

So Mr. Addy all this time believed that he may be moved out of the graphic arts department, but he was going to be given a job in the company. He was not going to be terminated, and I think this contention runs throughout his deposition, his statements, and I think it's a matter for a trier of fact to determine if this was a reasonable reliance or not. I think the Court from looking at the documentations submitted shows clearly that the EEO walked hand in hand with the company to give Mr. Addy these false promises and false hopes.

THE COURT: Well, I think he was told clearly and indisputably that he was going to be terminated and at least as early as March 20th, and I think that you have a statute of limitations problem here, and I think that controls it.

So I'm going to dismiss it on the basis that the statute of limitations has run, and if you take a look at the Miller case out of the Second Circuit, I think you'll find that that is controlling.

The pendent state claims are also dismissed because there's nothing left here. That will leave your state case, and that's probably where this belongs.

Now, let's talk about the McConnell case.

Mr. Sullivan, is there anything further to add in connection with the McConnell case?

MR. SULLIVAN: Your Honor, just one question on your decision in the Addy case: You are remanding the state cause of action?

THE COURT: No. No.

Isn't there a state case pending?

MR. SULLIVAN: We have a stipulation in this case where counsel was supposed to have dismissed the state court action back in May, but she hasn't done it as yet.

THE COURT: Well, I don't know what happened to that. I certainly don't control the state calendar, and I have no interest in that. I'm just saying that I have no jurisdiction in this case. The statute of limitations has run, and if there's a remaining claim and if the state case is still alive, and I don't know one way or the other on it.

I'm not remanding. This case wasn't removed, was it, in the first instance?

MS. CAMPBELL-THOMAS: No, your Honor.

THE COURT: No. So whatever is there is there, and if it's not there it's not there.

MS. CAMPBELL-THOMAS: We'd like to make it clear for the record, however, your Honor, whether the Court considered at all the state claims.

THE COURT: I'm dismissing the pendent state claims. I don't have a federal claim here, and there's no reason at all to keep the state claim. So the Addy case is dismissed.

Now, let's talk about McConnell.

MR SULLIVAN: Your Honor, the only additional comment we would make on our papers on the McConnell case is that — well, two points.

First of all, again, the Clutterham case is very important to the extent the Court considers the pendent claims, because again we have an absenteeism problem, and contrary to the assertions that counsel has made, there is nothing in her papers — nothing is rebutted at all, the chronic absenteeism of this person, bringing the Clutterham case into play.

THE COURT: Let's talk simply about the procedures there, because I think this is controlling before the DFEH claim was filed and immediately withdrawn, wasn't it?

MR. SULLIVAN: Yes, it was, your Honor.

We submit that it's clear under Vance v. Whirlpool and Wright vs. State of Tennessee the mandatory 60-day period under ADEA was never met at plaintiff's own instigation.

THE COURT: Okay.

MS. CAMPBELL-THOMAS: Your Honor, in regards to that response, we refer you to Carter vs. Smith Food King, the Ninth Circuit's claim in regards to a plaintiff's right to file an action to withdraw and issue a right-to-sue letter.

We do believe that the plaintiff although having a right to pursue her claim in the state court by filing with the Fair Employment and Housing, when she asked for her right-to-sue letter, the Fair Employment and Housing made a determination, issued the right to sue, albeit a couple of days, and issued that right to sue. In relation to Carter vs. Smith Food King, that is a viable right-to-sue letter.

THE COURT: Well, they were relying on some state action, weren't they?

MS. CAMPBELL-THOMAS: Yes.

In regards to the EEOC claims as the Court will note from papers submitted, the claimant received a notice from the Department of Equal Employment Opportunity Commission advising them in September of '83 that they were going to adopt the Fair Employment and Housing's decision if they did not — if they wanted to fight that decision of adopting the Fiar Employment and Housing decision, she could do so within 15 days.

The inference there is that the EEOC continued to allow the plaintiff's claim to be filed with them and then after —

THE COURT: But that was predicated upon a mistaken conduct by a state agency. You can't create jurisdiction in this court by an action of the state agency that's undertaken by mistake.

MS. CAMPBELL-THOMAS: Your Honor, in the deferral state, when a plaintiff files with Fair Employment and Housing, they also file with EEOC. They're given two separate numbers, two separate case numbers. The case for EEOC is then referred over to EEOC where it's held for 60 days in abeyance giving the state a chance to act.

THE COURT: But she withdraw that immediately.

MS. CAMPBELL-THOMAS: She withdrew the Fair Employment and Housing claim. She did not withdraw the EEOC claim, and the letter is clearly indicative of that.

When the EEOC subsequently several months later notified her —

THE COURT: She frustrated the 60-day period, didn't she, by legally withdrawing the claim?

MS. CAMPBELL-THOMAS: I don't think that the Court can consider that frustration.

THE COURT: Well, it upsets the statutory structure under which these claims are to be pursued.

MS. CAMPBELL-THOMAS: Your Honor, I think given the nature and the backlog of the EEOC commission as well as Fair Employment and Housing, the agencies would not have gotten to either case to investigate them within a 60-day period anyway.

THE COURT: That may be, but we don't know that.

I'm going to grant the motion. I'm going to dismiss this case, also. I just don't think I have jurisdiction. So the motions are granted and the pendent state claims are also dismissed, and again, whatever remedies may exist in the state court, of course, you have those, but I don't think these cases are properly in this court, Ms. Campbell-Thomas.

That will be the order.

MR. SULLIVAN: Thank you, your Honor.

MS. CAMPBELL-THOMAS: Thank you, your Honor.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Official Reporter Date

APPENDIX C

FILED
JUL 31 1987
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Nos. 85-6352
85-6354

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EVELYN McCONNELL and FLOYD RAY ADDY,
Plaintiffs/Appellants,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, et al.,
Defendants/Appellees.

ORDER
D.C. Nos. CV 84-2676
CV 84-2839

Before: REINHARDT and HALL, Circuit Judges, and MUECKE*, District Judge

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

---

* Honorable Carl A. Muecke, Senior United States District Judge, District of Arizona, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. app. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982).

626. Recordkeeping, investigation, and enforcement

. . . .

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed —

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation,

conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

The Portal-to-Portal Pay Act, 29 U.S.C. §§ 251-262 (1982).

255. Statute of Limitations.

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.] —

(a) if the cause of action accrues on or after May 14, 1947 — may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

Federal Rules Of Civil Procedure
Rule 56. Summary Judgment

(c) Motion and Proceedings Thereon,

. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

(e) Form of Affidavits; Further Testimony; Defense Required.

. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.